

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Hearing Date
July 31, 2000, at 10:00 a.m.

	x	
In re	:	
	:	Chapter 11
RANDALL'S ISLAND FAMILY GOLF	:	Case Nos. 00-41065 (SMB)
CENTERS, INC., <i>et al.</i> ,	:	through 00-41196 (SMB)
	:	(Jointly Administered)
Debtors.	:	
	x	

**OBJECTION OF TROTTER'S GLEN GOLF COURSE LIMITED PARTNERSHIP TO
MOTION FOR ORDERS PURSUANT TO SECTIONS 105, 363 AND 1146 OF THE
BANKRUPTCY CODE AND BANKRUPTCY RULES 2002, 6004, 6006 AND 6007
(I)(A) AUTHORIZING AND APPROVING (I) SALE OF CERTAIN FEE-OWNED
PROPERTIES, (II) ASSUMPTION, SALE AND ASSIGNMENT OF CERTAIN
LEASEHOLD INTERESTS, AND (III) SALE OF RELATED PERSONAL PROPERTY,
FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS AND
EXEMPT FROM ANY STAMP, TRANSFER, RECORDING OR SIMILAR TAX, (B)
APPROVING CERTAIN SALE PROCEDURES TO BE USED IN CONNECTION WITH
SUCH SALES, (C) APPROVING THE FORM OF SALE AND ASSIGNMENT
AGREEMENTS, (D) AUTHORIZING THE PAYMENT OF BROKERS' FEES IN
CONNECTION WITH SUCH SALES, (II) IN THE EVENT THAT PROPERTIES
REMAIN UNSOLD AT THE CONCLUSION OF THE OMNIBUS SALE HEARING,
AUTHORIZING AND APPROVING THE ABANDONMENT OF UNSOLD FEE-OWNED
PROPERTIES AND THE REJECTION OF UNSOLD LEASEHOLD INTERESTS, AND
(III) SCHEDULING AN EXPEDITED HEARING TO CONSIDER SHORTENING THE
TIME FOR, FIXING THE DATE, TIME AND PLACE FOR, AND APPROVING THE
FORM AND MANNER OF NOTICE AND HEARING ON SUCH SALES**

TO THE HONORABLE STUART M. BERNSTEIN,
UNITED STATES BANKRUPTCY JUDGE:

Trotter's Glen Golf Course Limited Partnership ("Trotter's Glen"), by its attorneys, Robinson
Brog Leinwand Greene Genovese & Gluck PC, objects to the *Motion for Orders Pursuant to
Sections 105, 363 and 1146 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006 and
6007 (i)(A) Authorizing and Approving (i) Sale of Certain FeeOwned Properties, (ii) Assumption,
Sale and Assignment of Certain Leasehold Interests, and (iii) Sale of Related Personal Property,
Free and Clear of Liens, Claims, Encumbrances, and Interests and Exempt from any Stamp,*

transfer, Recording or Similar Tax, (B) Approving Certain Sale Procedures to be Used in Connection with Such Sales, (C) Approving the Form of Sale and Assignment Agreements, (D) Authorizing the Payment of Brokers' Fees in connection with Such Sales, (II) in the Event that Properties Remain Unsold at the Conclusion of the Omnibus Sale Hearing, Authorizing and Approving the Abandonment of Unsold FeeOwned Properties and the Rejection of Unsold Leasehold Interests, and (III) Scheduling an Expedited Hearing to Consider Shortenign the Time for, Fixing the Date, Time and Place for, and Approving the Form and Manner of Notice and Hearing on Such Sales (the "Motion") and seeks the entry of an order denying the Motion with respect to the debtor Olney Family Golf Centers, Inc. (the "Debtor") and the Debtor's terminated lease of certain non-residential real property from Trotter's Glen. In support thereof, Trotter's Glen states:

PRELIMINARY STATEMENT

1. As set forth in more detail below, the Debtor was a tenant of Trotter's Glen pursuant to a lease which was terminated in accordance with its terms prior to the commencement of this case under chapter 11. Following termination of the lease, Trotter's Glen had commenced a civil action in state court in Maryland to evict the Debtor from the premises. Trotter's Glen has filed a motion pursuant to section 362(d) of the Bankruptcy Code seeking a modification of the automatic stay to permit the eviction proceeding to go forward.

2. Accordingly, as the Debtor's estate has no legal or equitable interest in the lease, Trotter's Glen seeks the entry of an order denying the Motion to the extent it relates to the Debtor and its terminated Lease with Trotter's Glen.

3. In short, this Objection restates and incorporates Trotter's Glen's prior objection to the *Motion Pursuant to Sections 363 and 105 of the Banrkruptcy Code and Bankruptcy Rule 6004 for Order (A) Approving a Global Bidding Procedures Program for the Sale of Debtors' Interest*

in Certain Non-Residential Real Property, (B) Authorizing the Debtors to Grant Pre-Approved Break-Up Fees to Potential Purchasers of Non-Residential Real Property, and (C) Authorizing and Approving the Terms and Conditions of Auctions for the Sale of Debtors' Interest in Certain Non-Residential Real Property (the "Prior Sale Motion") filed by the Debtor.

4. Additionally, the Debtor and Trotter's Glen have reached an preliminary agreement with respect to the treatment of Trotter's Glen's lease in connection with this case and the schedule for considering Trotter's Glen's motions for relief from the automatic stay and various objections filed to date. That agreement has been filed with this Court for approval. The Motion, is contradictory to the terms of that agreement and to the extent it seeks to avoid or circumvent the Debtor's obligations under that agreement Trotter's Glen submits the Motion should be denied.

JURISDICTION AND VENUE

5. Jurisdiction over this civil action is vested in the United States District Court for this District pursuant to sections 1334 of title 28 of the United States Code (the "Judicial Code") .

6. This civil action has been referred to this Court for consideration pursuant to section 157 of title 28 of the United States Code (the "Judicial Code") and the *Standing Order of Referral of Cases to Bankruptcy Judges* (S.D.N.Y. July 10, 1984) (Ward, Acting C.J.).

7. This is a core proceeding arising under title 11 of the United States Code or arising in a case under title 11 of the United States Code. *See* 28 U.S.C. § 157(b)(1). The statutory predicate for the relief sought by the Debtor herein is section 363 of the Bankruptcy Code.

8. Venue of this civil proceeding in this district is proper pursuant to section 1409 of the Judicial Code.

BACKGROUND

THE DEBTOR

9. The Debtor is a Delaware corporation doing business at 225 Broadhollow Road, Suite 106E, Melville, New York 11747.

TROTTER'S GLEN

10. Trotter's Glen is a Maryland limited partnership doing business at 16410 Batchellors Forest Road, Olney, Maryland 20832.

THE LEASE

11. On or about March 26, 1997, Trotter's Glen, as landlord, and the Debtor, as tenant, entered into a *Lease Agreement* (the "Lease") with respect to certain real and personal property located in the town of Olney, Montgomery County, Maryland and more particularly described therein (the "Golf Course").

TERMINATION OF THE LEASE

12. The Debtor has materially breached its obligations under the terms of the Lease.

13. Section 9.01 of the Lease states that in the event of a default under the terms of the Lease, Trotter's Glen may, at it's election:

declare this Lease canceled and terminated, in which event this Lease shall terminate as if that were the day originally fixed herein for expiration of the term of this Lease, and Landlord, the agents or representatives of Landlord, shall have the right, without further demand or notice, to re-enter and take possession of the Leased Premises, with or without process of law, and remove all persons and their property from the Leased Premises. . . .

Lease, § 9.01(2).

14. By letter dated December 2, 1999, Trotter's Glen terminated the Lease. The December 2, 1999, termination letter provides that "Pursuant to Article IX, Section 9.01, please be advised that the Landlord is hereby canceling and terminating the above-referenced Lease Agreement as a result of your company's failure to remedy numerous breaches in a timely manner."

15. The December 2, 1999, termination letter further provides that "[p]ursuant to Section 9.01(B)(2), the above-referenced Lease Agreement *is terminated effective immediately* and your company is directed to vacate the premises without further delay." (emphasis supplied).

THE STATE COURT ACTION

16. On or about March 7, 2000, Trotter's Glen commenced a civil action against the Debtor in the Circuit Court for Montgomery County, Maryland, entitled *Trotter's Glen Golf Course Limited Partnership v. Olney Family Golf Centers, Inc.* (the "State Court Action") seeking the entry of judgment against the Debtor for being in material breach of the Lease and awarding possession of the Golf Course to Trotter's Glenn.

17. The Debtor did not file an answer in the State Court Action.

18. A hearing was scheduled to be held on April 26, 2000, in the State Court Action; however, due to illness, the State Court Judge was unable to hear the matter on that date and Trotter's Glen was unable to have the matter rescheduled prior to the commencement of this case.

THE BANKRUPTCY CASE

19. On May 4, 2000, the Debtor commenced this case under chapter 11 of the Bankruptcy Code by filing a voluntary petition for relief with this Court.

20. No trustee or examiner has been appointed. A committee of creditors has been appointed and has retained counsel.

THE STIPULATION

21. On, July 6, 2000, this Court held a hearing to consider the *Motion of Trotter's Glen Golf Course Limited Partnership for Relief from the Automatic Stay* which was filed by Trotter's Glen seeking authorization to continue the State Court Action to evict the Debtor.

22. At that hearing, the Debtor and Trotter's Glen reached a tentative agreement which contains the following material terms:

(a) if the Debtor did not have a buyer and had not filed a revised motion for approval of a buyer by July 31, 2000, possession of the Trotter's Glen Golf Course would be turned over to Trotter's Glen on July 31, 2000; and

(b) if the Debtor had found a buyer and filed a motion seeking approval of such buyer by July 31, 2000, than the Court would hold a hearing on August 15, 2000, to consider (i) Trotter's Glen's objection that the Lease had been terminated pre-petition and the Debtor had no interest to sell, and (ii) any objection Trotter's Glen may have to the potential sale or purchaser pursuant to section 365 of the Bankruptcy Code or otherwise.

23. The precise terms of the agreement between the Debtor and Trotter's Glen have been reduced to a written stipulation and order which has been noticed for settlement and signature by this Court.

DISCUSSION

24. The Lease was terminated on December 2, 1999, substantially prior to the commencement of this case. Accordingly, the Debtor can not sell it's interest in the Lease becuase the Debtor has no interest to sell.

25. Further, the Debtor's right to sell it's interest in the Lease, if any, is circumscribed by the terms of its Stipulation with Trotter's Glen. The Motion seeks to circumvent those provisions

by setting a hearing to consider a sale to an unknown purchaser sometime after the July 31, 2000, deadline agreed to by the parties.

26. Finally, even assuming that the Debtor has the right to seek to sell its interest, if any, in the Lease contrary to the Stipulation and the termination of the Lease, the procedures proposed by the Debtor for doing so are improper and inconsistent with the rights of Trotter's Glen under the Bankruptcy Code.

THE LEASE TERMINATED PRE-PETITION

27. Pursuant to section 9.01(2) of the Lease, the Lease was effectively terminated by Trotter's Glen on December 2, 1999. Trotter's Glen's December 2, 1999, termination letter to the Debtor stated that the Lease was terminated "effective immediately" and directed the Debtor to immediately vacate the premises. The Debtor's interest in the Lease ceased immediately in accordance with the terms of the Lease and the termination letter. *See In re Cohoes Indus. Terminal, Inc.*, 70 B.R. 214, 219 (S.D.N.Y. 1986) ("Under the terms of the lease, the Debtor's interest in the property ceased at [the time the termination notice became effective] and the Debtor was required to quit the property."); *Realworth Properties, Inc. v. Bachler*, 223 N.Y.S. 2d 910, 915 (Sup. Ct. 1962) (termination letter to tenant terminated lease according to its terms).

THE LEASE IS NOT PROPERTY OF THE ESTATE

28. Leases which have been terminated pre-petition are not property of the estate. *Gloria Mfg. Corp. v. Int'l Ladies' Garment Workers Union*, 734 F.2d 1020 (4th Cir. 1984).

29. Further, the mere commencement of a case under chapter 11 will not revive a lease that has already been terminated. "The filing of a bankruptcy petition does not resurrect a lease, and a bankruptcy court does not have power to resurrect a lease which was terminated prior to the filing

of the lessee's bankruptcy petition." *Bell v. Alden Owners, Inc.*, 199 B.R. 451, 458 (S.D.N.Y. 1996); *see, e.g., Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1206 (7th Cir. 1984).

THE DEBTOR CAN NOT ASSUME THE LEASE

30. The Debtor can not assume the Lease because it was effectively terminated prior to the commencement of this case. As the District Court for this District has held:

A debtor's interest in an unexpired lease constitutes property of the bankruptcy estate pursuant to section 541 of the Bankruptcy Code and under Code section 365, a debtor has the right to assume or reject its unexpired leases. *Once a lease is terminated, however, nothing remains for a debtor to assume under section 365.*

Bell, 199 B.R. at 462 (emphasis supplied) (citations omitted).

31. Inasmuch as the Debtor can not assume the Lease, it stands to reason, *a fortiori*, that it can not assign the Lease. Accordingly, Trotter's Glen is entitled to an Order denying the Motion insofar as it relates to the Debtor, the Lease, or Trotter's Glen.

THE PROPOSED PROCEDURE VIOLATES THE STIPULATION

32. The Debtor and Trotter's Glen have already reached a stipulation setting forth the rights of the parties with respect to the Lease. As set forth therein, if the Debtor has not by July 31, 2000 (i) found a buyer for its interest in the Lease, and (ii) filed a motion for approval of the sale of the Lease to that buyer, then the Debtor is required to turn over possession of the Leased property on July 31, 2000. Alternatively, this Court has scheduled a hearing for August 15, 2000, to consider the issues related to any proposed sale that is properly noticed by the Debtor in accordance with the stipulation.

33. The procedures proposed by the Motion are contrary to the terms of the Stipulation and should be rejected by this Court to the extent they apply to Trotter's Glen.

OBJECTION TO PROCEDURE STATED IN THE ALTERNATIVE

34. In the event that this Court determines that the Lease has not terminated, or otherwise determines to permit the auction of the Debtor's interest in the Lease to go forward, Trotter's Glen objects to the procedures set forth in the Motion.

35. Trotter's Glen objects to the relief requested by the Debtors to the extent that such relief deprives Trotter's Glen of its right to receive (i) the cure or the adequate assurance of the prompt cure of presently existing defaults, (ii) compensation for or adequate assurance of compensation for actual pecuniary loss resulting from existing defaults, and (iii) adequate assurance of future performance under the Lease. Satisfaction of these rights is a condition precedent to approval of the Motion. 11 U.S.C. § 365(b)(1); *cf. In re Wingspread Corp.*, 116 B.R. 915 (Bankr. S.D.N.Y. 1990).

36. In that connection, Trotter's Glen believes that any order approving the assumption and assignment of the Lease should not be entered until Trotter's Glen has had a reasonable opportunity to assess the ability of any proposed assignee to cure past defaults, compensate Trotter's Glen for pecuniary losses and provide "adequate assurance" of future performance within the meaning of sections 365(b)(1) and 365(b)(3) of the Bankruptcy Code..

CURE AND ADEQUATE ASSURANCE OF FUTURE PERFORMANCE

37. An intended assignee must demonstrate that it has the ability to satisfy the financial obligations imposed by the Trotter's Glen Lease. *See In re Lafayette Radio Electronics Corp.*, 9 B.R. 993 (Bankr. E.D.N.Y. 1981); *In re Bygaph, Inc.*, 56 B.R. 596 (Bankr. S.D.N.Y. 1986); *In re Evelyn Byrnes, Inc.*, 32 B.R. 825 (Bankr. S.D.N.Y. 1983). Additionally, Trotter's Glen believes that approximately \$500,000 to \$800,000 must be expended by any assignee in order to cure past defaults

under the Lease and bring the Debtor's performance thereunder back into compliance with the Lease terms.

38. Unless and until such assurances are provided and are determined by this Court to be adequate, the assumption and assignment of the Trotter's Glen Lease is prohibited. 11 U.S.C. § 365(b). Assurances are particularly significant where no buyer has been identified and, consequently, no balance sheet or past credit history has been or can be provided.

39. The Debtor has not identified any potential assignee, and has failed to provide Trotter's Glen with any information concerning such an entity. Further, inasmuch as any assignment is subject to higher and better offers, the actual intended assignee of the Trotter's Glen Lease has not yet been identified.

40. The Motion does not provide Trotter's Glen with any financial information from which Trotter's Glen can determine whether a proposed assignee can provide adequate assurance of future performance under the Lease. Trotter's Glen submits that the question of adequate assurance is one which must be determined by the Court upon reasonable notice, sufficient to allow Trotter's Glen to obtain and review, and if necessary take discovery with respect to and object to, the financial statements of any allegedly successful purchaser.

41. Without an opportunity to review such information, Trotter's Glen cannot determine whether it is sufficient to provide the types of adequate assurance required pursuant to sections 365(b)(1)(C) and 365(f)(2)(B) of the Bankruptcy Code.

TIMELINESS OF INFORMATION

42. The Motion's failure to provide for the timely delivery of such information to Trotter's Glen prohibits Trotter's Glen from obtaining such assurances and determining whether they are adequate or objectionable. Accordingly, it does not appear that Trotter's Glen will have an adequate

opportunity to determine if the required assurances could be or have been met by the successful bidder, or to raise any questions in that regard to the Court's attention.

43. In order to assess the ability of a prospective assignee to provide it with adequate assurance of future performance, Trotter's Glen will require appropriate disclosure and proof of any successful bidder's financial wherewithal and ability to timely perform all of the covenants and conditions of the Lease (the "Required Information"). Trotter's Glen believes that it will require a minimum of thirty days from its receipt of the Required Information to perform its due diligence with respect to any prospective assignee of the Lease. However, it is not possible for Trotter's Glen to review the financial wherewithal, plans and *bona fides* of proposed assignees who have not yet been disclosed.

44. To the extent that the Debtor accepts an offer for the assumption and assignment of its interest in the Lease, Trotter's Glen submits that this Court ought to delay entry of an order until Trotter's Glen has had a minimum of thirty days' opportunity (from its receipt of the Required Information) to do its due diligence with respect to such entity and to file an appropriate objection pursuant to sections 365(b)(1) and (b)(3) of the Bankruptcy Code.

CONCLUSION

45. No previous application for the relief requested herein has been made to this or any other Court.

46. As there are no novel issues of law in connection with the relief sought hereby, and the legal authorities are set forth herein, Trotter's Glen requests that the Court waive any requirement for the filing of a separate memorandum of law in support of this motion.

WHEREFORE, Trotter's Glen seeks the entry of an order denying the Motion to the extent it relates to the Debtor and its terminated Lease with Trotter's Glen and granting such other and further relief as is just and appropriate.

Dated: New York, New York
July 28, 2000

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